Section 41 of the Forest Practices Code - Adequate Management and Conservation of Forest Resources

Special Report

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Introduction

Section 41 of the *Forest Practices Code of British Columbia Act* (the Act) governs the approval of operational plans to effect forest operations on Crown land. An operational plan in the Act means a forest development plan, logging plan, range use plan, silviculture prescription, stand management prescription and site plan. Section 41(1)(a) states that district managers[1] may only approve an operational plan if it has been prepared according to the *Forest Practices Code of British Columbia Act* and related regulations (the Code). It also states in section 41(1)(b) that district managers must be satisfied that the plan will "adequately manage and conserve" forest resources in the area of the plan. Section 41 was to be informed by strategic planning as provided for in Part 2 of the *Forest Practices Code of British Columbia Act*. Without a completed Code, there has been a greater need for discretion in the section 41 decisions by statutory decision-makers.

In the summer of 2000, the Minister of Forests and the Minister of Environment, Lands and Parks asked the Forest Practices Board (the Board) to evaluate the effectiveness of section 41 in meeting the intent of the Code as set out in its preamble. The Board was also encouraged to make any recommendations it considered appropriate. In response, the Board decided to prepare this special report for distribution to the public and the ministers. Since that time, a new government is in place and intends to make substantial changes to the Forest Practices Code, to move from a prescriptive to a more results-based approach to regulating forest practices. While the specific requirement set out in section 41(1)(b) may or may not exist in the new Code, the public interest in ensuring adequate management and conservation of forest resources will not disappear. In the Board's experience, this has been one of the most problematic areas of the existing Forest Practices Code. Indeed the multiple views about what this means have surfaced around the Board table, as they have among the public. Whatever form the new Code takes, the issue will continue to exist. In that light, the Board offers the following discussion and recommendations to help government as it moves forward with a new model of regulation.

The words "adequately manage and conserve" can be widely interpreted because the Act does not provide an explicit definition and, therefore, defining the purpose of section 41 has become controversial. The controversy surrounding section 41 became especially evident through the Board's recent report on forest development planning.[2] Based on 361 interviews, the Board learned that the majority of Ministry of Environment Lands and Parks staff, Department of

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[1] Section 41 of the Act refers to decisions by a district manager or a designated environment official. Both officials are also referred to as statutory decision-makers. For ease and simplicity, this report refers to district managers as the primary decision-maker, but that is intended to also include designated environment officials where appropriate.

[2] *Special Report on the Forest Development Planning Process in British Columbia*, December 2000, Forest Practices Board.

Fisheries and Oceans staff, First Nations, licensed users (other than timber licensees), interested parties and the public felt that forest development plans (FDPs) do not adequately manage and conserve forest resources. On the other hand, the majority of Ministry of Forests staff and timber licensees felt that FDPs did adequately manage and conserve forest resources.

Some of the early concerns expressed by members of the public about the application of section 41 were triggered by policy guidance in government bulletins, which subsequently were expressed in district manager rationales for approving FDPs. However, considerable time has passed since some of these concerns were raised and the approach to the application of section 41 continues to evolve. Despite this evolution, the Board remains concerned about public confidence with section 41 decisions surrounding forest practices.

Since FDPs contain the majority of forest practices conducted on Crown forest lands, and therefore section 41 decisions by district managers have a considerable impact on the land base, the Board chose to focus its discussion in this report on FDPs.

This report is based on the Board's work to date with: auditing compliance and enforcement of the Forest Practices Code; investigating public complaints; conducting special investigations; and requesting reviews and appeals under the Code. In preparing its report, the Board also considered relevant government bulletins, district manager rationales and other information. An external review group provided helpful comments on an earlier draft at the request of the Board. These references combined, reflect many perspectives on section 41 and the difficult task put before the Board.

Discussion

Section 41 within the overall legislative context

The context of a legislative provision includes not only the immediate context (section 41) and the rest of the *Forest Practices Code of British Columbia Act* in which the provision appears, but also any other legislation that may cast light on the meaning or effect of the words[3]. Forest management in British Columbia is not only regulated by the Code, but by many other provincial statutes including: *Forest Act, Ministry of Forests Act, Forest Land Reserve Act, Forest Renewal Act, Ministry of Environment Act, Wildlife Act, Parks Act, Range Act, Petroleum and Natural Gas Act, Coal Act, Geothermal Resources Act, and Mines Act.* District managers must interpret appropriate pieces of legislation and apply them to the circumstances before them.

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[3] "The preamble offers another source, arguably one that is more authoritative. By spelling out the assumptions the legislature takes to be true, the policies and principles it wants to advance and the values to which it is committed, the preamble offers interpreters an authoritative form of guidance" *Driedger On the Construction of Statutes,* Third Edition, Ruth Sulliovan, Chapter 11, p.261

Therefore, section 41 cannot be reviewed without recognizing its context within the Code Act. The overall intent of the Act can be found in the preamble, which states:

"WHEREAS British Columbians desire sustainable use of the forests they hold in trust for future generations;

AND WHEREAS sustainable use includes:

(a) managing forests to meet present needs without compromising the needs of future generations;

(b) providing stewardship of forests based on an ethic of respect for the land;

(c) balancing economic, productive, spiritual, ecological and recreation values of forests to meet the economic, social and cultural needs of peoples and communities, including First Nations;

(d) conserving biological diversity, soil, water, fish, wildlife, scenic diversity and other forest resources; and

(e) restoring damaged ecologies."

In general, a preamble is relied upon to give meaning and effect (intent) to the legislative language contained in an Act. In the context of sustainable use, the Code preamble describes present and long-term *objectives*, at a broad scale, to help inform operational plans which describe short-term forest *operations* for a small area (e.g., five year forest development plan).

PART 2 of the Act, *Strategic Planning, Objectives and Standards*, allows government officials to establish resource management zones, landscape units and sensitive areas, and to set objectives for these areas of land. Objectives for resource management zones, landscape units, sensitive areas, (and for recreation sites, recreation trails, and interpretive forest sites) are collectively referred to in the Act as "higher level plans." PART 2 also empowers the provincial chief forester to set standards (section 8) for operational plans and practices.

PART 3 of the Act, *Operational Planning Requirements for Government and for Forest and Range Tenure Agreements*, sets out the content requirements of operational plans (section 10), operational planning requirements (section 17 – assessments, data and analyses), along with exemptions, amendments and replacement requirements of operational plans. In addition, PART 3 ensures operational plans submitted by a licence holder undergo review and comment (section 39) before being approved. Lastly, PART 3 contains section 41, which governs the approval of operational

Operational plans prepared by government for the Small Business Forest Enterprise Program are given effect under section 40 of the Code Act, rather than section 41. A recent addition to the *Operational Planning Regulation*, section 1.1, makes it clear that the district manager must be satisfied that these plans will adequately manage and conserve the forest resources of the area to which they apply.

plans by a district manager or a designated environment official.

This legislative arrangement illustrates a hierarchical structure for sustainable use starting with the preamble, plans for that use through successive planning scales (provincial scale down to the operational scale), and ultimately ends in an approval for use by a district manager under section 41.

It is important to recognize that strategic planning and section 41 are not the only mechanisms in the Code that address sustainable use of forest resources. Other mechanisms that help to meet the section 41(1)(a) requirement are contained in PART 4 of the Act and regulations. These include:

- forest practices specific to forest and range tenure agreements (sections 45, 46, 47, 48, 51);
- road design, construction, maintenance, use and deactivation requirements (sections 60, 61, 62, 63, 64);
- timber harvesting requirements (sections 67, 68);
- silviculture and range treatments (sections 71, 74); and
- the practices regulations under the Code (Forest Road Regulation, Operational Planning Regulation, Range Practices Regulation, Timber Harvesting Practices Regulation).

Together these statutes provide for sustainable use of all forest resources (consumptive and non-consumptive) by British Columbians.

Strategic Planning

Strategic plans such as land and resource management plans (LRMPs) establish the balance and public vision for environmental, social and economic interests. They are, by design, broad and not conducive to prescriptive wording. Strategic plans, when declared, represent the best way to achieve the balancing of values described in paragraph (c) of the preamble for broad land use objectives. Objectives for specific forest resources are legally established in higher level plans (HLP). Higher level plans are developed as a subset of an approved strategic land use plan and by their legal nature are more prescriptive and measurable. Standards specific to operational plans and practices can be set by the chief forester, but to date have not been enacted.

The Code provides for further strategic planning provisions, which are found in the Operational Planning Regulation (OPR). The OPR enables the chief forester and the deputy minister of Water, Land and Air Protection to establish wildlife habitat areas and ungulate winter ranges, and to establish management practices for these areas. Both officials may also

elevate the status of a stream by classifying any fish species as regionally important and identified as threatened or endangered.

The implementation of the direction contained in PART 2 of the Act was intended to inform the forest practices contained in PART 3's operational plans. Unfortunately, implementation of the various strategic planning measures is still incomplete. Resource management zones have only been established in the Cariboo-Chilcotin, Kamloops/Clearwater, Kispiox, Vancouver Island and Kootenay/Boundary areas of the province. Landscape units have been legally established in only 3 of 40 forest districts (Kootenay Lake, Arrow and Bulkley). In addition, a single landscape unit (Bunster) has been established in the Sunshine Coast Forest District, although draft landscape units are used to provide management direction in some additional locations.

No chief forester standards have been established. Except in TFL 37 on Vancouver Island, no ungulate winter ranges have been established under the OPR, although there are some "grandparented" ungulate winter ranges that will expire in October 2003. Until very recently, only two wildlife habitat areas were established.

Full implementation of this planning and approval structure for operational plans would greatly assist district managers in exercising their discretion under section 41. Indeed, the Board found in its FDP special report, that among those involved with the planning process, satisfaction that FDPs adequately manage and conserve forest resources was higher where there was a n HLP or an approved land and resource management plan in place.

The following specific example illustrates how the planning process can enhance both sound forest management and public confidence. A strategic plan has identified an area of high scenic value. The landscape unit plan has an assigned visual quality objective (VQO) specific to that scenic area. The FDP has a proposed cutblock within the scenic area with a prescribed silvicultural system that retains enough timber to meet the assigned VQO. The district manager approves the cutblock because it meets the stated objectives as provided by public input at the strategic planning level and measurable objective provided by the landscape unit pan. The planning process is transparent and understandable.

In the absence of approved strategic plans, which reflect the social, economic and environmental balances provided by society, the ability of a district manager to define explicitly what it means to adequately manage and conserve the forest resources of an area is made more difficult.

Regional land use plans and LRMPs have the potential to influence forest planning and practices in two important, but different ways. Firstly, where objectives from land use plans are legally designated as HLPs under the Code, they become legal requirements for licensees under section 41(1)(a) that must be followed in operational planning.

Secondly, even when they have not been declared HLPs under the Code, land use plans can still provide important policy guidance to district managers under section 41(1)(b). Because elected officials (provincial Cabinet) eventually approve draft land use plans after due process

involving many interests, these plans will often provide the best available information on the desired mix of social, economic and environmental values and their appropriate uses.

In its FDP special report the Board stated its belief that effective forest development planning requires three levels of plans:

1. strategic land-use plans (e.g., LRMP) that set out broad objectives for land use;

2. landscape-level plans (e.g., landscape units, resource management zones) that translate those broad objectives into clear and measurable targets and strategies to manage and conserve forest resources; and

3. forest development plans that set out forest development activities in a specific area, consistent with those targets and strategies.

The following passages are taken from that report:

> While there has been progress in completing strategic land use plans, there is still a significant gap between the objectives of these plans, and operational planning at the FDP level. Although strategic land use plans are a necessary component of planning, they are usually too broad to give specific guidance to FDPs...There is a need for landscape-level plans, which provide more specific guidance for measuring the consistency of an FDP with the objectives of strategic land-use plans and associated higher level plans. Under the scheme of the Forest Practices Code, this level of planning is intended to occur through landscape unit plans.
>
> The current government policy to limit the scope of landscape unit plans (to address old-growth management areas and wildlife tree patches only) will not be sufficient to accomplish the objective of facilitating efficient and effective forest development planning that manages and conserves forest resources.

In the same report, the Board recommended that:

> Government complete landscape unit plans as soon as possible. Landscape unit plans should be broadened in scope to provide clear and measurable objectives for the full range of forest resources and provide meaningful guidance to operational plans. Landscape unit plans must involve the broad public during their development. This will allow the public to have input into objectives for resource management and conservation at the landscape level.

The government of the day responded to this recommendation on March 30, 2001, stating that it fully agreed with the Board's findings on the benefits of landscape unit planning. It pointed out, however, that substantial cost and time are involved. It also commented that it would be extremely difficult to broaden the objectives for landscape unit planning at this time. The

current government is presently reviewing this issue and their position with respect to this recommendation is not known.

Resource information and planning scale as they relate to section 41(1)(b)

Under section 41(1)(b), district managers are being asked to assess the adequacy of a proposed operational plan to manage and conserve forest resources with respect to "the area to which it applies." No definition of this phrase is provided in the Code, yet understanding what it means is critical to answering whether the area's forest resources are being managed and conserved. The "area to which it applies" has been given some context by the Forest Appeals Commission (FAC) in the Klaskish/Brooks Bay case, which dealt with an FDP[4]. The FAC ruled that the area under the plan is the entire area to be developed over a five-year period. Although the decision was more complex than this, for the purposes of this report the area under the plan will mean the entire area contained within the FDP boundary.

Out of this 1996 FAC ruling, district managers could reasonably anticipate that the plan must manage and conserve all resources contained within the boundary of the FDP, in accordance with legislation [licensees' responsibility as per section 41(1)(a)] and, the best available information [district managers' responsibility as per section 41(1)(b)]. However, within the confines of any one particular FDP, deciding whether a forest resource (for which information exists) is being managed and conserved can become extremely difficult. For each of these resources there are many considerations, some being: extent and content of existing information; social, economic and environmental values; local, regional, and provincial distribution; and mobility.

The extent, quality and reliability of information are crucial for the decision-maker. Many resources already have social, economic and environmental values attached to them by society. For example, the timber resource in an area usually comes with a great deal of information [inventories (species, quality, amount, etc.); allowable annual cut apportionment; tenure and licensee apportionment; contractual obligations] The available information on a local timber resource usually includes social, economic and environmental values. For many forest resources, the information is limited, and society's values are not yet articulated.

It must also be recognized that not all forest resources are represented on the same square metre, hectare, cutblock, forest stand, valley or watershed. Some resources (rare endangered species) or values (scenic) are clearly area specific or local. Other resources are well represented over large geographic areas in BC. Even area-specific resources can be represented over a broader geographic area than a single FDP.

Many resources, such as wildlife, are mobile by nature and have much larger boundaries within which they can be managed and conserved. Does this mean the district manager has to

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[4] Appeal No. 96/04(b), Forest Appeals Commission

look beyond the boundaries of the single FDP when deciding on the "manage and conserve" question? Logically, one would have to conclude yes.

A district manager may also need to look beyond the boundaries of the single FDP when a particular forest resource comes with little information at the operational scale. It may become necessary to view that forest resource at a broader (higher up, larger land area) planning scale. Usually further, but perhaps less specific, information can be found at the ever-increasing levels of planning scale.

At the LRMP planning scale, it is easier to evaluate the sustainable use of all forest resources by considering how they inter-relate and possibly balance with one another. At the landscape unit or resource management zone planning level there is a more limited range of resources and values represented and there is correspondingly less potential to balance all resources and values within this more limited land area. At the operational scale, the range of resources and values becomes an even more limited sub-set. Operational plans are inherently more variable at this scale and could be expected to emphasize some forest resources more than others. This could lead to a result that does not provide equal weight for all local values.

To provide overall balance at the strategic level, the district manager would need to consider the contribution of the one plan under review to the cumulative balance provided by other operational plans for nearby areas. This balancing must take into consideration the objectives and cumulative risks for all resources for the entire area for which the district manager is responsible. It is no small task to decide if all resources are being adequately managed and conserved for an individual operational plan. District managers often must make decisions involving strategic planning scale issues, in order to ensure operational plans adequately address the question posed by section 41(1)(b). This is particularly the case where higher level planning is not in place.

Decision-making under section 41(1)

As illustrated in the previous section, the decision to be satisfied that an operational plan will manage and conserve all forest resources is complex. District managers often have to consider a number of different, often conflicting or competing resources and values in operational plans.

Although completed strategic planning will greatly assist the district manager's task in ensuring that operational plans manage and conserve, there will invariably be situations where a lack of information exists for particular resources. Preparers of operational plans, district managers, and others interested in achieving the goals of the Code preamble therefore need to fall back onto a variety of sources of information to find guidance in assessing what it means to adequately manage and conserve forest resources when they propose, review or approve plans.

A district manager must approve an operational plan or amendment under section 41(1) as submitted by a licence holder if it meets a two-part test:

- the plan must have been prepared and submitted according to Code requirements [s.41(1)(a)]; and,

- the district manager must be satisfied that the plan will adequately manage and conserve forest resources[5] in the plan area [s.41(1)(b)].

Section 41(1)(a) requires an operational plan to be in compliance with the many provisions of the Code. FDPs must also be consistent with declared HLPs. Operational plans must also comply with chief forester standards established under PART 2 of the Act and operational planning requirements detailed in PART 3 of the Act. In addition, an operational plan must at a minimum recognize and specify measures to protect forest resources identified in the OPR.

A licence holder must prepare a plan that meets the requirements stated in the Code. This includes content (limited to information that has been available for at least four months prior to the submission of a plan), necessary assessments, measures to achieve objectives, and consideration of review comments from agencies and the public. If the operational plan addresses all these items, that plan meets the first part of the two-part test, namely section 41(1)(a). However, the district manager is obliged to review the submitted operational plan, carrying out both parts of the test.

It is important to recognize that section 41(1)(a) cannot provide for every detail around every existing forest resource to ensure its sustainable use in the context of the preamble. Such legislation would not be practical, or desirable. Therefore, in acknowledgement of the limitations around section 41(1)(a), section 41(1)(b) was necessary. Exercising good judgement with discretion is preferable to ever more detailed legislation.

Section 41(1)(b) is a separate and distinct test that the plan must meet for the forest resources contained in the area under the plan. Under this test the district manager must consider not only the legally required content of the FDP, but also other forest resources he/she is aware exist within the area under the plan. Unlike a licensee submitting an operational plan, a district manager is not constrained by a time frame (i.e., four months relates only to the licensee's submission) when addressing responsibilities under section 41(1)(b). If a district manager has information that a proposed plan does not yet address a forest resource adequately through meeting the test of section 41(1)(a), then section 41(1)(b) provides a safety net, which facilitates the further consideration of that forest resource.

Further consideration may include sources of information from: existing research; the public; round table decisions; draft land use plans or LRMPs; guidebooks or guidelines such as those for community watersheds, trails and recreation facilities; professional and technical advice

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[5] Forest resources are defined as "resources and values associated with forests and range, including, without limitation, timber, water, wildlife, fisheries, recreation, botanical forest products, forage and biological diversity," *Forest Practices Code Act of British Columbia Act*, RS Chap. 159.

from specialists; referral comments from the FDP review and comment process; and government policies. In practice, district managers rely on a variety of sources for guidance in assessing the adequacy of an operational plan to manage and conserve resources.

If the district manager's further consideration still does not meet the requirements set out in section 41(1), then as per section 41(2) the district manager may require the licensee to submit further information that the district manager reasonably requires in order to determine if the plan or amendment meets the requirements of section 41(1).

Ultimately, the district manager must weigh all of the information to determine the relevance and importance of each applicable forest resource, and then consider risk in combination with potential consequences in making the final approval decision. Every substantial provision of every FDP is approved or not approved at risk. For example, if harvesting is approved there will be some degree of conservation or spiritual risk, if not approved, some degree of social and economic risk. But no matter what the risk, the potential consequences must ensure that the resource is still managed and conserved.

District managers could use a number of possible decision support tools, such as risk analysis, in weighing the decision about how an operational plan affects the sustainability and use of applicable forest resources. Risk analysis is a useful decision-making tool that can provide a measure of the potential impact of an FDP on each of the identified forest resources in the area. This gives the district manager an estimate of the potential effect (positive, neutral, negative) that the plan would have on the sustainability and use of each of the forest resources identified, and thus a means to give definition to the "adequately manage and conserve" requirement. Risk assessment should include the concept of "thresholds" so that potential consequences of an FDP that may not be reversible, or which may push a resource beyond the recoverable limit, can be treated with greater caution. Thresholds can be related to environmental, social or economic issues.

Section 41(1)(b) requires that the district manager assert that he/she is satisfied that an operational plan both manages and conserves forest resources. Satisfaction will vary with the issues involved, as G.H.L. Fridman states in his writings on standards of proof[6]. He also states "The more trivial the question, the more easily and swiftly will "satisfaction" materialize. The more momentous and serious its consequences, the greater the caution and deliberation demanded, that is, the greater amount of cogent evidence before there can be any "satisfaction" about where the truth lies." It follows that the district manager's assertion should be substantiated in writing, especially where there is conflict or potential negative effect, to ensure transparency for all interested persons.

In the Board's FDP special report it was found that there is no specific procedure that all district managers follow to make a determination around adequately manage and conserve. Perhaps

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[6] The Canadian Bar Review, Volume XXXIII, p. 670

the reason is that such a procedure might be construed to reduce the district manager's ability to make the decision freely. However, given the magnitude of the land base affected by FDP approvals, the Board finds the lack of direction for consistency in the interpretation of section 41(1) surprising.

Ultimately too, the Board finds itself in the position of district managers when it tries to determine the purpose of section 41(1). Is the purpose of section 41(1) to be predominantly a conservation purpose, or is it to balance competing or conflicting forest resource impacts in decisions about plan approval? Or does the purpose fall somewhere in between? The Board itself contains differing views, views that are also strongly held by differing segments of society. The two most frequently expressed views are offered below for consideration.

Is section 41(1)(b) predominantly a conservation purpose?

In Canadian law, where legislation contains a preamble, reliance on the preamble to help determine the purpose of the legislation is considered to be appropriate. The Code preamble contains five key points, which can be summarized in the following five key words: managing; respecting; balancing; conserving; and restoring. The linkage between section 41(1)(b) and the preamble clearly lies with the words managing and conserving. Section 41(1)(b) does not direct the district manager to consider whether a forest development plan balances economic, social and environmental values, instead it says that the district manager must be satisfied that the plan will adequately manage and conserve the forest resources.

Balancing social, economic and environmental values is essential under the Code and other forest legislation, but is more appropriately accomplished through strategic level planning and social decision-making. Because of the economic and social importance of logging and timber processing, provincial governments have for many years established policies, through legislation, to maintain a level of stability. These policies include the chief foresters' determination of AAC, cut control and appurtenancy. However, the purpose of these policies, like the original forestry concept of "sustained yield," is to assist communities, not ecosystems.

Section 41(1)(a) links strategic level planning and landscape unit planning to the operational planning scale. The district manager has the legal authority to determine if the plan is consistent with approved strategic direction, but it does not give the district manager the authority to make social determinations about trade-offs between resources.

FDPs are the legitimate means by which licensees extract timber from the land base. This is their social licence to operate, and in proposing the activities outlined in the FDP the licensee has already considered their economic viability. Therefore, section 41(1) ensures that the "externalities" or consequences of these activities on other resources will be addressed. So adequately managing involves planning the appropriate activities to carry out timber harvesting in a way that will adequately conserve forest resources and thus provide for sustainable use. Section 41(1) is thus, fundamentally an environmental safety net for all resources that may be affected by a proposed activity.

Appropriately the district manager can ask questions such as:

- Do the proposed practices compromise the productivity of the land?
- Does the plan threaten the habitat of a species at risk?

These types of questions, while addressing a range of values, focus specifically on the land base in the area under the plan and the forest resources in that area.

On the other hand, it is not appropriate for the district manager to ask questions such as:

- Does the plan help or hinder local business?
- Will the plan impact employment in a nearby community?

These types of questions are focussed not on the forest resources in the area under the plan, but on the broader issue of distribution of social and economic benefits of the plan. Questions such as these are vitally important to communities, but they must be addressed elsewhere, not in section 41(1) decisions.

Section 41(1) decisions by district managers are applicable to the limited area of an operational plan. The planning scale of an operational plan is often not capable of providing or being solely responsible for the more complete social, economic and environmental balance that could be expected at the scale normally addressed by an LRMP, where numerous operational plans are accumulated.

FDPs lack sufficient information for decisions about socio-economic issues. Therefore, a district manager's determination under section 41(1) must focus on managing and conserving the resources in the specific area outlined in the operational plan, not balancing. Section 41(1)(b) can therefore be seen as predominantly a conservation purpose.

Is section 41(1)(b) to be used to balance competing or conflicting forest resources?

This view also relies on the preamble to inform section 41(1)(b). As stated in *Driedger On the Construction of Statutes*: "By spelling out the assumptions the legislature takes to be true, the policies and principles it wants to advance and the values to which it is committed, the preamble offers interpreters an authoritative form of guidance.[7]" The legislature located two fundamental assumptions within the initial whereas of the preamble, i.e., "Whereas British Columbians desire sustainable use of the forests they hold in trust for future generations....".

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[7] Driedger on the Construction of Statutes, 3rd ed. By Ruth Sullivan. Toronto: Butterworths, 1994.

This whereas answers any question about what it is that we want to do with our forests as well as how we want to do it. British Columbians wish to use[8] (the forests of BC and further, British Columbians desire for that use to be sustainable[9].

The assumption of use helps to inform that part of section 41(1)(b) which requires satisfaction that an operational plan will adequately "manage[10]" or "make use of" forest resources. The assumption, that use be sustainable, helps to inform that part of section 41(1)(b) which requires satisfaction than an operational plan will adequately "conserve,[11]", that is "keep from harm" the forest resources.

This requirement that a district manager be satisfied that an operational plan make use (including economic use) of the forest resources, as well as keep the forest resources from harm, contains the potential for conflict. Given incomplete strategic planning, a district manager is inevitably faced with considering, and often resolving, conflicting forest resources or associated values at the operational level. In that context, can the preamble assist and give any specific guidance on how the legislature intended competing or conflicting values of the forest to be resolved by a district manager's exercise of discretion?

There appears to be only one provision that provides district managers with specific guidance on how to resolve such value conflict. The second "whereas" of the preamble defines the sustainable use of the forests of British Columbia in some detail, including: "...c) balancing economic, productive, spiritual, ecological and recreational values of forests to meet the economic, social, and cultural needs of peoples and communities, including First Nations....". The preamble here spells out whose needs we manage our forest for, identifies what needs the legislators intended to be met and lists the values of the forest that are to be considered. Most importantly the preamble here advances the policy that district managers engage in balancing these values.

The preamble's call for balance does not, however, imply the application of a rigid balancing, which always gives equal weight to each of the values or resources. Nor does it imply that any forest value systematically be given inordinate weight. With the words "is satisfied" and

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[8] Gage Canadian Dictionary: **use 1** put into action or service; avail oneself of for a particular purpose: **3** consume or expend by using:

[9] Canadian Oxford Dictionary: **sustainable 1** *Ecology* (esp of development) that conserves an ecological balance by avoiding depletion of natural resources (*sustainable agriculture, sustainable forestry*)

[10] Gage Canadian Dictionary: **manage 1** control; conduct; handle; direct; manage a business; manage a horse. **2** conduct affairs. **5** make use of; Canadian Oxford Dictionary: **manage 1** tr. organize; regulate; be in charge of (a business, household, team, a person's career, etc.); The Compact Oxford Dictionary – New Edition: **manage 9a** to operate upon, manipulate for a purpose; to till (land).

[11] Gage Canadian Dictionary: **conserve** 1 keep from harm or decay; protect from loss or from being used up; Canadian Oxford Dictionary: **conserve 1** store up; keep from harm, damage or depletions esp. for later use.

"adequately," section 41(1)(b) of the Act clearly anticipates that the balancing be accomplished by granting district managers considerable discretion and that district managers will use their own best judgement. Balancing competing forest values can only be achieved by a sensitive, informed and unfettered decision-maker.

An FDP that meets the prescriptive content requirements of the Act, as outlined in section 41(1)(a), can address a full range of forest resources and values, including environmental ones. Where a district manager has information about any resource that has not been addressed by section 41(1)(a), section 41(1)(b) then provides a safety net for that resource. Section 41(1)(b) also contemplates a balancing, if the sustaining or the use of that resource conflicts with the sustaining or use of any other resource. This safety net encompasses, and this balancing can involve, all forest resources and their values, not just or predominantly environmental ones. Section 41(1)(b) cannot, therefore, be seen as having predominantly a conservation purpose.

What are the commonalities and differences between these broadly held views?

Both views share commonality with the concept that section 41(1)(b) is a safety net for any forest resource not explicitly addressed by the licensee in their submission of an FDP, but for which the district manager has information. The licensee is provided with some stability in planning their forestry operations, to only consider what is legislated in the Code, and available four months prior to their submission. The district manager has no time constraint and can consider all information that has come to his/her attention before approving the FDP. This provides the safety net to ensure forest resources have not been overlooked in the planning process.

Both views also share commonality around balancing and environmental protection, but these concepts are perceived differently. The preamble requires that FDPs reflect balanced consideration of a wide range of resources, values and human needs to achieve sustainable use of forests. Where the balancing occurs is different for each view. One view interprets the balancing as a social exercise, beyond the authority of a district manager, to be provided through strategic planning. The other view holds that at times, when resources are in conflict, district managers need to engage in a balancing at the operational planning level, particularly in the absence of strategic level planning.

As for the differences, one view perceives section 41(1)(b) as the last avenue for environmental protection of a forest resource that has not been explicitly protected by the Code requirements. It perceives the safety net provided by section 41(1)(b) as predominantly a conservation purpose. The other view perceives section 41(1)(b) as a safety net, but as a last avenue to address social, economic and environmental values or uses that have not been explicitly addressed by the legislation.

Although two views have been presented, it is logical to assume that there are many other interpretations that may fall between these. Indeed, because a district manager has discretion to

interpret the purpose of section 41(1)(b) in the absence of specific guidance, it is not surprising that section 41(1)(b) is being inconsistently applied.

District managers' application of section 41(1)(b)

When the Forest Practices Board considers a district manager's application of section 41(1)(b) in an investigation, audit or review, there are five aspects of the decision and its results that can be assessed:

- process – the process employed to assemble and incorporate guidance;
- inputs – the completeness and quality of the specific sources of guidance and information used;
- reasoning – the reasoning used to give weight to the various factors in making the decision;
- outcomes – the actual impacts on the sustainable use of the forest resources as a result of the FDP; and
- transparency – all of the above needs to be transparent to interested persons so they can understand how the decision was made.

The reasoning needs to be available to all parties at the time of the decision. In the absence of strategic and landscape unit level planning, this reasoning will clearly need more explanation. In cases where conflict, competition or potential negative effect occurs for any forest resource, decisions will require more reasoning, which must be transparent to all parties.

One of the principles of statutory decision-making is that decision makers must make up their minds independently. They must follow the statutes provided to them. They must not mechanically follow government policies or guidelines or the views of others, although it is legitimate to consider them. The use of sound logic, and judgement based on the best available information, must be transparent to anyone reviewing the decision. To avoid challenge to decisions, or accusations of being arbitrary, the district manager needs to set down how they executed their obligation under section 41(1)(b). Even so, it is difficult for the Board to assess district managers' reasoning in the absence of a clear purpose for section 41(1)(b) and declared objectives and strategies for forest resources in many parts of the province.

Conclusions

The preamble to the Code clearly sets the tone for forest management operations conducted on Crown land. It guides how British Columbians desire to sustainably use their forests.

The Code currently contains a tension in the phrase "adequately manage and conserve." Both managing and conserving are fundamental to sustainable resource use and inherent in a Forest Practices Code and its implementation. With the current Code there is ambiguity around this phrase, especially where it is not properly and explicitly dealt with elsewhere, such as in HLP objectives and landscape-level planning. By default, the decision to address adequate management and conservation remains to be addressed in the section 41(1)(b) statutory operational plan approval decision. The ambiguity of this section results in wide-ranging and sometimes contradictory interpretations as to its purpose and application. This has resulted in differing perceptions that operational plan approvals are meeting the requirements of section 41(1)(b) to adequately manage and conserve forest resources. Consequently, there is inadequate assurance in the current structure of operational plan approvals under section 41(1) to ensure that the intent of the Code as described in the preamble is being met.

Uncertainty about the purpose of section 41(1)(b) limits its effectiveness in achieving the intent of the Code. Although both views see it as a safety net, that safety net is cast out in different ways.

District managers rely on a variety of sources for guidance and will likely continue to do so when making their section 41(1)(b) decision. In light of the extensive land area that is affected by district managers exercising this discretionary decision, all parties have a right to see or know how that discretion was exercised. Providing district managers with a consistent process to exercise good judgement with discretion is preferable to providing ever more detailed legislation. Such a process can be effective in ensuring that all forest resources in British Columbia are managed and conserved for the enjoyment of future generations.

Recommendations

1. In recognition that legislation and planning cannot always foresee every forest resource in need of consideration, there is need for a safety net such as section 41(1)(b). The safety net can have differing purposes, from predominantly a conservation purpose to addressing–and where they conflict, balancing–a range of forest values and resource uses. Government needs to ensure a safety net is in place and define what purpose it is specifically intended to perform.

2. Statutory decision-makers should ensure that the basis for approving any operational plan or permit is made clear to any interested party.